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IN THE

Supreme Court of the United States

October Term, 1959.

No. 426

JAMES H. MORRISON,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA.

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October Term, 1959.

No. .....

JAMES H. MORRISON,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA.

To the Honorable the Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

James H. Morrison, by his counsel, David H. Caplow, respectfully petitions for a Writ of Certiorari to review a decision of the District Court of Appeal, Second Appellate District, State of California, 168 A. C. A. 298, 335 P. 2d 1022, rendered on February 26, 1959, which affirmed the judgment, and denial of Motion for New Trial, of the Superior Court of the State of California, in and for the County of Los Angeles.

A Petition for Rehearing was timely filed in said District Court of Appeal on March 13, 1959, which was denied on March 17, 1959. A Petition for Hearing was timely filed in the Supreme Court of the State of California on April 7, 1959, which was denied on April 22, 1959.

A.

STATEMENT OF THE CASE.

On July 3, 1955, in Rawlins, Wyoming, John T. Collins, secretary of Stadia Oil and Uranium Corporation, during a conversation with petitioner and one, Bernard Livingston, a securities salesman, discussed the Corporation's proposed expansion and development plans and aroused petitioner's desire to obtain some of its stock, but he was advised that none was available. On July 8, 1955, Collins telephoned petitioner that he had found a stockholder with 9,850 shares of stock available who would offer them at $1.00 per share; petitioner accepted the offer and told Collins his check for the stock was being mailed immediately, and received Collins' assurance that petitioner was the owner of the stock therewith. On July 9, 1955, Collins telephoned him to acknowledge receipt of the check, again confirming the petitioner's ownership of the stock, and stating that the transfer thereof to petitioner would be made as quickly as possible. Exhibit 38, a check, dated July 14, 1955, in the amount of $9,850.00, payable to John T. Collins, drawn on and paid from petitioner's account; Exhibit T, a certificate for 10,000 shares of Stadia stock, from which C. A. Upson, holder of record, assigned 9,850 shares to petitioner through the agency of John T. Collins, are evidence of the foregoing transaction.

On five occasions thereafter, petitioner bought additional Stadia stock from Austin B. Smith Brokerage Company, Salt Lake City, Utah, issuing his checks to that concern as follows: Exhibit No. 39, dated July 18, 1955, for $17,800.00; Exhibit 40, dated July 31, 1955, for $4,700.00; Exhibit 41, dated August 20, 1955, for $4,000.00; Exhibit 42, dated August 20, 1955, for $18,

200.00; and Exhibit 43, dated September 13, 1955, for $1,100.00. In each instance, upon delivering his check to Smith, he received a confirmation order bearing thereon the inscription that, as principal, Smith sold the stock for his own account, to petitioner, the confirmation orders being received by him in the same sequence, in which the checks were tendered, as follows: Exhibit 44, for 17,800 shares; Exhibit 45, for 4,700 shares; Ex. 46, for 4,000 shares; Exhibit 47, for 18,200 shares; and Exhibit 48, for 1,100 shares. All of the foregoing evidence was voluntarily made available to the district attorney's office, by petitioner, on November 30, 1955.

The record clearly shows that petitioner bought and sold the Stadia Oil and Uranium Corporation stock for himself, and for his own account, and that, at no time was he an incorporator, officer, director, employee of, or agent or issuer or underwriter for Stadia Corporation; at no time was he other than a shareholder of said corporation and his ownership of the Securities was later admitted by the prosecution. Such admission was made in Respondent's Brief as well as in the opinion by the District Court of Appeal. Indeed, the record discloses that the only stock involved, upon which this prosecution was based, was the stock of Stadia Oil and Uranium Corporation. Petitioner was charged with selling said stock as follows:

Count I	George Neikrug	250 Shares
Count III	W. John Pangman	1,000 Shares
Count V	Stanley Marlowe	2,100 Shares
Count VII	Ada Bell	500 Shares
Count VIII	Anne Pratt	1,500 Shares
Count X	Taylor Holmes	500 Shares
	Total	5,850 Shares

On December 12, 1956, just 12 days after a jury, in the United States District Court, Salt Lake City, Utah, had returned a verdict against the complaining witnesses, as plaintiffs, and in favor of petitioner, on substantially the same grounds charged in the case at bar, the district attorney, of Los Angeles County, had petitioner arrested on a Complaint Felony, Case No. 135211, Municipal Court, Los Angeles Judicial District, State of California, alleging violation of Section 26104(a), Corporations Code, State of California, a typical count of which follows:

> "That on or about.....day of....., 1955, at and in the County of Los Angeles, State of California, the crime of Violation of Section 26104(a), Corporations Code, a felony was committed by James H. Morrison, who, at the time and place last aforesaid, did willingly, unlawfully, feloniously and knowingly engage in the business of buying and selling, offering for sale, and negotiating for the sale of securities and purchasing securities with the purpose of reselling them to the public as defined in Section 25006 of the Corporations Code, in that the defendant did on or about said date sell and offer for sale and caused to be sold, for value, to wit.....Dollars ($.....), to John Doe, a security, to wit, shares of stock in a company known as and called Stadia Oil and Uranium Corporation, a corporation, organized under the laws of the State of Nevada, for profit, without first having applied for and secured from the Commissioner of Corporations of the State of California, a license so to do;"

and violation of Section 487(1), Penal Code, State of California; thereafter, he was released on bail.

On December 17, 1956, petitioner filed a Demurrer to Complaint [Clk. Tr. pp. 12 to 23] in Case No. 135211, on the grounds that:

". . . the alleged facts therein stated do not constitute a public offense . . ." and that

". . . the Corporate Securities Act of California does not require an individual to secure a broker's license before selling his own securities and to do so would b an unwarranted, illegal and unconstitutional violation of defendant's rights."

On January 3, 1957, the court dismissed the Demurrer, over petitioner's objection, without ruling upon it.

On January 21, 1957, petitioner was arraigned in the Superior Court, State of California, County of Los Angeles, and was served with an Information [Clk. Tr. pp. 1 to 11] in Case No. 187 290, a typical count of which follows:

"The said JAMES H. MORRISON is accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of VIOLATION OF SECTION 26104(a), CORPORATIONS CODE, a felony, committed as follows: That the said JAMES H. MORRISON on or about ..... day of....., 1955, at and in the County of Los Angeles, State of California, did willfully, unlawfully, feloniously, and knowlingly, engage in the business of buying and selling, offering for sale, and negotiating for the sale of securities and purchasing securities with the purpose of reselling them to the public as defined in Section 25006 of the Corporations Code, in that the defendant did on or about said date sell and offer for sale and cause to be sold, for value, to wit, ... Dollars ($.....), to John Doe, a se-

> curity, to wit, shares of stock in a company known as and called Stadia Oil and Uranium Corporation, a corporation, organized under the laws of the State of Nevada, for profit, without first having applied for and secured from the Commissioner of Corporations of the State of California, a license so to do."

Therewith, he gave notice that he was entering his Motion under Section 995, Penal Code, to dismiss the Information, and filed on February 15, 1957, a Memorandum of Points and Authorities in Support of Motion under Section 995, Penal Code [Clk. Tr. p. 24], filing a Supplemental Memorandum of Points and Authorities on February 28, 1957. On February 28, 1957, the Motion Under Section 995 was denied.

On March 8, 1957, petitioner filed a Demurrer to the Information [Clk. Tr. pp. 27 to 41] on the grounds that:

> ". . . the Information does not state a public offense; and, because it does not state a public offense, the defendant's inalienable rights, guaranteed under the Constitutions of the United States and the State of California, will be violated by compelling defendant to submit to a trial under such defective information;"

which was overruled on March 11, 1957. Thereafter, petitioner filed a Petition for Writ of Prohibition on March 15, 1957, in the District Court of Appeal, Second Appellate District, State of California, which was denied on April 10, 1957.

On July 8, 1957, petitioner was made to stand trial and on July 23, 1957, was acquitted, by the jury, of violation of Section 487(1), Penal Code, and one count of violation of Section 26104(a), Corporations Code [Clk.

Tr. pp. 71 to 75, but was found guilty on the remaining counts of alleged violation of Section 26104(a), Corporations Code.

Petitioner filed Points and Authorities in support of his Motion to Dismiss [Clk. Tr. pp. 44 to 55; he also filed a Motion for New Trial [Clk. Tr. pp. 137 to 173], on August 22, 1957. His Motions were denied and petitioner was sentenced on August 30, 1957; he filed his Notice of Appeal therewith.

Petitioner filed his Opening Brief, in the District Court of Appeal, Second Appellate District, State of California, on April 10, 1958; Respondent's Brief was filed therein on July 30, 1958, and Petitioner's Reply Brief was filed therein on November 12, 1958. The Court rendered its Opinion on February 26, 1959; petitioner filed a Petition for Rehearing on March 13, 1959, which was denied on March 17, 1959. Petitioner filed a Petition for Hearing in the Supreme Court, State of California, on April 7, 1959, which was denied on April 22, 1959.

In filing the accusatory pleading against petitioner, and throughout the ensuing trial; the district attorney endeavored to establish an agency relationship between the Stadia Corporation and petitioner, well recognizing that, in order for such transactions to come within the purview of the Corporate Securities Law, some agency must be established between the Corporation and petitioner, so that he could be considered in the catagory of issuer or underwriter. However, during his argument at the summation of the trial, the district attorney confessed to the jury that no such agency had been established [Rep. Tr. pp. 1025-1026], quote:

> Mr. Stovitz: * * * Now, there is only an inference in this case, ladies and gentlemen, I don't think

that that inference is supported by very substantial evidence, that the defendant was acting as the agent for this Stadia Oil and Uranium Company in the sale of these stocks. If we had additional evidence of that agency relationship, then I'd say to you there was sufficient evidence to show that there was a violation of the law in connection with Mr. Hefter; but we don't have that evidence.

Manifestly, all of the evidence, in the instant case, established the fact that petitioner purchased the stock for his own account, that he was acting only for himself and that he was not acting for, and had no connection with the Corporation other than as a shareholder. Respondent, in its Brief, admitted that petitioner was the owner of the stock he sold, as follows (pp. 90-91):

"It was not contended that the appellant did not own the shares of stock which he sold to and had issued to the complaining witnesses. And there is no evidence that the appellant ever transferred the shares represented by the certificate for 9850 shares which he asserted he bought before he sold any shares of stock to the complaining witnesses."

(P. 101.)

"There is no question . . . of the passage of title to the shares which appellant sold to the complaining witnesses. There was no evidence that the appellant did not have title to the shares which he had issued to the complaining witnesses."

(P. 88.)

". . . there was no question about the binding nature of the sales."

However, respondent then contended that petitioner was still a broker, as defined in Section 25006, Corporations Code, because he was "purchasing such securities with the purpose of reselling" them. On this point, the District Court of Appeal, State of California, more than 21 years ago, in *People v. Davenport*, 21 Cal. App. 2d 292, had decided that "Counts . . . (which) simply charged defendant with having purchased a security for the purpose of reselling it . . . could not be said (to have) stated a public offense." The trial court refused to give petitioner's instructions among which was included an instruction that the Constitution of California, Article 1, Section 1, guaranteed all citizens the rights of acquiring, possessing and protecting property.

In the Opinion, from which this appeal is being taken, respondent has now taken the position, based on *People v. Woolsey*, 13 Cal. App. 2d 54, that petitioner, even though he was the owner of the stock he sold, was required to have a broker's license, or permit, as specified in Section 25700, Corporations Code, because he was deemed to be one who "engages in business" when selling his own stock for his own account, and this position was taken even though there is no statutory criterion, or previously defined standard, as to what constitutes "engaging in business."

B.

STATEMENT DISCLOSING BASIS FOR JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 1257(3), Title 28, United States Code.

2. The Opinion, rendered by the District Court of Appeal, Second Appellate District, State of California, was entered on February 26, 1959; a Petition for Rehearing, timely filed pursuant to Rule 27(b), Rules on Appeal was denied on March 17, 1959. A Petition for Hearing, timely filed in the Supreme Court, State of California, pursuant to Rule 28(b), Rules on Appeal, was denied on April 22, 1959, Rule 28(e), Rules on Appeal. Therefore, the Opinion, rendered by the District Court of Appeal, became final on March 28, 1959, according to Rule 24(a), Rules on Appeal, and is the decision of the highest court, in the State of California, in which a decision could be had.

The time for the filing of a Petition for Writ of Certiorari extends for ninety (90) days from April 22, 1959, the date when the Petition for Hearing was denied by the Supreme Court of the State of California; thereafter, petitioner applied to, and received from, the District Court of Appeal, Second Appellate District, an Order Staying the Issuance of Remittitur until July 22, 1959, pending the filing of this Petition for Writ of Certiorari herein.

3. A Statement of the Case has been previously presented herein at *A*, above.

In demurring to the Complaint, with which this action was initiated, petitioner relied upon the Fifth and Fourteenth Amendments, United States Constitution, guaran-

teeing due process of law, and the Sixth Amendment, of the Constitution, guaranteeing that an accused be informed of the nature and cause of the accusation; the court dismissed the Demurrer without considering these Constitutional guarantees.

In moving to set aside the Information, as provided in Section 995, Penal Code, State of California, on the ground that petitioner had been committed without reasonable or probable cause, he relied upon the Fifth and Fourteenth Amendments, United States Constitution, guaranteeing due process of law, and the Sixth Amendment, of the Constitution, guaranteeing that he be informed of the nature and cause of the accusation; the court denied the Motion without considering these Constitutional guarantees.

In demurring to the Information, petitioner relied upon the Fifth and Fourteenth Amendments, United States Constitution, guaranteeing due process of law, and the Sixth Amendment, guaranteeing that he be informed of the nature and cause of the accusation; the court overruled the Demurrer without considering the Constitutional guarantees.

During his trial, petitioner presented evidence pertaining to a trial, between himself and the complaining witnesses in a Federal Court in another State, relying upon Article IV, Section 1, United States Constitution; the court refused to admit the proffered evidence without considering this Constitutional guarantee.

Further during the trial, petitioner submitted his jury instructions to the court, relying upon the Fifth and Fourteenth Amendments, United States Constitution, guaranteeing due process of law and equal protection of

the law; the court refused to give petitioner's requested jury-instructions without considering these Constitutional guarantees.

In moving that the court dismiss the proceedings, after trial, petitioner relied upon the Fifth and Fourteenth Amendments, United States Constitution, guaranteeing due process of law; the court denied the Motion without considering these Constitutional guarantees.

In moving for a New Trial, petitioner relied upon the Fifth and Fourteenth Amendments, United States Constitution, guaranteeing due process of law, and Article IV, Section 1, of the same Constitution, guaranteeing that full faith and credit shall be given in each State to the acts, records, and judicial proceedings of every other State; the court denied the Motion without considering these Constitutional guarantees.

In his Opening Brief, before the District Court of Appeal, Second Appellate District, State of California, petitioner presented Federal Constitutional points in his assignment of Errors therein, relying upon the Fifth and Fourteenth Amendments, guaranteeing due process of law and equal protection of the laws, and Article IV, Section 1, guaranteeing that full faith and credit shall be given in each State to the acts, records, and judicial proceedings of every other State. In his Reply Brief, petitioner additionally relied upon the First Amendment, United States Constitution, guaranteeing freedom of speech and press. These Constitutional guarantees were not considered by the court in its Opinion.

In his Petition for Rehearing, before the District Court of Appeal, petitioner placed additional reliance upon the Sixth Amendment, United States Constitution, guaranteeing him notice of the nature and cause of the accusa-

tion. The court denied the Petition without considering the Constitutional guarantees in any manner whatsoever.

In his Petition for Hearing, before the Supreme Court, State of California, petitioner relied upon the First Amendment, guaranteeing Free Speech and Press; the Fifth and Fourteenth Amendments, guaranteeing due process of law and equal protection of the law; and the Sixth Amendment, guaranteeing notice of the nature and cause of the accusation; all of the United States Constitution. The Court denied the Petition without giving any Opinion whatsoever.

4. The following conclusions of the California court, that:

(a) An owner of securities, although he is not the issuer or underwriter thereof, must apply for and secure a license or permit from the Commissioner of Corporations before he can sell them;

(b) The contracting for the future delivery of stock by an individual, even though for his own account as owner, is evidence of "engaging in business," requiring a permit;

(c) The Corporate Securities Law, State of California, is not unconstitutional, is not repugnant to the United States Constitution;

(d) The Information, upon which petitioner was tried, was sufficient;

(e) The trial court did not err in refusing to admit petitioner's proffered evidence pertaining to a trial between petitioner and the complaining witnesses, in another State (evidence offered to show the litigating of the same issues, as well as for the purpose of impeachment, and to show bias);

(f) The court did not err in refusing to give petitioner's requested instructions;

(g) The court did not err in refusing to discuss, with petitioner's counsel, the requested instructions;

(h) The misconduct of the judge and the district attorney did not deny petitioner a fair trial;

present, for this Court's determination, substantial questions relating to said rights and privileges as exercised by the individual. The criteria, set up by the District Court of Appeal, and application thereof to the individual, are at variance with principles announced by this Court, and not in accord with the applicable decisions of this court.

5. The following cases are believed to sustain this Court's jurisdiction:

Oyama v. California, 332 U. S. 633:

> "In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled."

Craig v. Harney, 331 U. S. 367:

> "In a case where it is asserted that a person has been deprived by a state court of a fundamental right secured by the Constitution, an independent examination of the facts by this Court is often required to be made."

United States v. Pink, 315 U. S. 203:

"This court will review or independently determine all questions on which a federal right is necessarily dependent."

Fay v. New York, 332 U. S. 261, in which the court held that:

In considering whether the statute is administered so as to produce unconstitutional results, this Court must examine the evidence and reach its own conclusions as to the facts.

Norris v. Alabama, 294 U. S. 587:

"When a federal right has been specifically set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of the evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding Constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured (cited cases)."

Plumbers Union v. Graham, 345 U. S. 192:

". . . It is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records, in the state courts where a claim of consitutionality is effectively made."

C.

THE QUESTION PRESENTED.

Broadly stated, the question presented is this:

Whether the Individual's Constitutionally Guaranteed Right to Acquire, Possess, and Protect Property, Which Includes the Right to Contract for and Dispose of Said Property, Can Be Abrogated by State Law.

Stated more specifically, the foregoing question is divided into sub-questions as follows:

(a) Whether the individual owner of stock, although not the issuer or underwriter thereof, can be required to apply for and secure a broker's permit, or license, from the Commissioner of Corporations, State of California, before he may dispose of said stock for his own account.

(b) Whether the individual owner of stock, although not the issuer or underwriter thereof, can be required to apply for and secure a broker's permit, or license, from the Commissioner of Corporations, State of California, before he may offer for sale, or negotiate for the sale of, said stock for his own account.

(c) Whether the individual owner of stock, although not the issuer or underwriter thereof, can be required to apply for and secure a broker's permit, or license, from the Commissioner of Corporations, State of California, before making a sale thereof if he purchased said stock with the purpose of reselling it or offering it to the public from his own account.

(d) Whether the individual owner of stock, although not the issuer or underwriter thereof, who does any or all of the following acts for his own account:

1. Sells,
2. Offers for sale,

3. Negotiates for the sale of,
4. Purchases stock with the purpose of reselling it, or of offering it to the public,

"engages in business" as a "broker," defined in Section 25006, Corporations Code, State of California, requiring a permit, or license, under Section 25700 of said Code.

(e) Whether the individual owner of stock, not being the issuer or underwriter thereof, can be required to apply for and secure a broker's permit, or license, from the Commissioner of Corporations, State of California, before he may use a circular letter, or advertisement, to make an offer to sell, an attempt to sell, or a solicitation of a sale of his stock, as set forth in Section 25009, Corporations Code, State of California.

(f) Whether the individual owner of stock, not being the issuer or underwriter thereof, is exempt from the Corporate Securities Law, State of California, as provided by Section 25152, Corporations Code, State of California, when making sales of his own property for his own account.

(g) Whether the individual owner of stock, although not an officer or agent of the issuer or underwriter thereof, who, upon selling his own stock for his own account, is accused of committing a felony in violation of Section 26104(a), Corporations Code, allegedly "engaging in business" as a "broker" (Section 25006, Corporations Code) without first having secured a permit from the Commissioner of Corporations so to do, has been given "notice" as guaranteed by the Sixth Amendment, and afforded due process of law guaranteed by the Fifth and Fourteenth Amendments, of the United States Constitution.

(h) Whether Sections 25006 (defining broker), 25008 (defining security), 25009 (defining sale), 25152 (providing exemption of owner, except as provided elsewhere), and 26104(a) (enumerating certain acts), Corporations Code, State of California, are repugnant to the United States Constitution.

(i) Whether the doctrine set forth in *Hall v. Geiger-Jones Co.*, 242 U. S. 539, is applicable to transactions of an owner of securities, although not the issuer or underwriter thereof, or an officer or agent of the issuer or underwriter, and may be invoked as a blanket rebuttal to inquiries as to the Constitutionality of the California Corporate Securities Law.

[The *Geiger-Jones* decision may be pertinent as to the validity of the "Blue-Sky" law, of Ohio State, in controlling the right of an individual to act in the capacity of "broker" or "agent."

But the Supreme Court *did not have before it the matter of a legislative enactment which abrogated the securities-owner's constitutionally-guaranteed right to buy and sell securities* issued by others, *solely for his own account*; it did not have before it a law which directly abridged the privileges and immunities of an individual owner of securities by delegating, to an administrative officer, plenary legislative powers the exercise of which could effectively throttle the owner's right of free speech and free press guaranteed by the First and Fourteenth Amendments of the United States Constitution; it did not have before it statutes containing terms so vague and ambiguous that they "prohibited conduct which may be prohibited and conduct that may not," affording "no reasonably ascertainable standard of guilt" and "therefore too uncertain and vague to be enforced" (*In re*

Bell, 19 Cal. 2d 488), and that a charge for violation thereof—against a securities-owner—would annihilate his right to *notice* under the Sixth Amendment, United States Constitution. In other words, the Supreme Court did not have before it a case wherein a person's constitutionally guaranteed rights were abrogated by legislative enactment, as in the case at bar; instead, it had before it, in the *Geiger-Jones* case, a situation wherein the individual sought to exercise rights, that existed as a matter of legislative grace, without complying with the requirements which were concomitant with their exercise.

Because of the vast dissimilarity between the grounds basing the *Geiger-Jones* case and those basing the case at bar, the use, by the District Court of Appeal in its Opinion, of the *Geiger-Jones* case as a blanket refutation of petitioner's assertion, that the California Corporate Securities Law is unconstitutional, appears to be a frequently used expedient to avoid declaring the Corporate Securities Law, wholly or in part, unconstitutional.

It would appear that citing the *Geiger-Jones* case, as a blanket refutation of petitioner's contention that the Corporate Securities Law of California is unconstitutional, is an "insubstantial finding of fact screening reality" (*Plumbers Union v. Graham*, 345 U. S. 192), which, if permitted to continue in force and effect, would defeat petitioner's "constitutional freedom," including "the guarantees of the Bill of Rights."]

(j) Whether the plenary power delegated to the Commissioner of Corporations, by the California Legislature under the Corporate Securities Law, permits the denial of the individual's Constitutional rights to acquire, possess, protect, dispose of, and contract for, property.

(k) Whether a denial of procedural due process is reversible error.

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) The criterion, applied by the State court, in holding that an owner of securities, although neither the issuer nor the underwriter thereof, is required to apply for and secure a permit, or license, from the Commissioner of Corporations, State of California, before he may sell said personally-owned securities, is that said owner "engages in business" (Op. p. 15). The State relied on *People v. Woolsey*, 13 Cal. App. 2d 54, and Sections 25006, 25700, Corporations Code, State of California. Assuming the correctness of the contention, as applied, nevertheless, this Court will inquire whether the criterion, as applied, denied rights safeguarded by the Fifth and Fourteenth Amendments, United States Constitution.

* * * * * *

In the *Woolsey* case, it was decided that the Legislature had the right to regulate a securities-owner's disposition of his own stock, of which he was neither the issuer or underwriter, for his own account, a doctrine based upon *State v. Swenson*, 172 Minn. 277, in which the Minnesota Supreme Court stated that the uniform trend of the Minnesota decisions was *not* in harmony with *People v. Pace* (Calif.), 73 Cal. App. 548, but was in an *opposite* direction therefrom. The *Pace* case stated:

> "It is difficult to believe that the Legislature intended to impose burdens on certain individuals in (a) manner that would not apply to all persons of the same class, for certainly there is no basis in law for such a distinction.
>
> "As we have pointed out in the outset of this opinion, it is readily apparent that if the act in ques-

tion is sustained, a great many individuals *who are owners of securities* which they themselves did not issue or underwrite, *would be required to secure a broker's license* . . .

"Any legislative enactment that is reasonably subject to the interpretation we have just pointed out manifestly is in conflict with the Fourteenth Amendment to the Constitution of the United States. In Corpus Juris, page 1144, this proposition is thus stated: 'The amendment (the Fourteenth) was intended to secure equality of right, and *it renders unconstitutional all laws which may be properly construed as applying to persons or property arbitrarily and with discrimination, unequally or unjustly.*'

"We are of the opinion that the Corporate Securities Act under consideration, in so far as it attempts to require a *natural person* to secure a broker's permit as provided in said act *before he may lawfully sell his* OWN *securities*, where he is not the issuer or underwriter of the same, *is unconstitutional and invalid* for the reasons herein set forth." (Emphasis added.)

The same court, a little more than a year after it had decided the *Woolsey* case, decided in *People v. Davenport*, 21 Cal. App. 2d 292, that the doctrine set forth in the *Pace* case was the correct one for California by quoting from it as follows:

"The attorney general conceded that *it would invade the constitutional rights* of a citizen if he were prohibited from selling his securities, which he would have a legal right to buy and possess . . .

"The act . . . provides a power to refuse a permit, which would make absolute prohibition in the sale of one's securities. The only purpose of the act . . . is to lay a foundation for the Corporation Commissioner that may or may not, according to his finding, result in an absolute prohibition of the sale of his securities." (Emphasis added.)

In the case just quoted, the court also said that if one of the primary objects of government is to enable the citizen to acquire, possess, and protect property, a right guaranteed by the Constitution, *how can it be impaired by legislation?*

(*People v. Pace, supra*):

"*But nowhere* in the authorities sustaining the regulation of the business of brokers *do we find authority* . . . that the police power . . . may be invoked to interfere with the sale by an individual of his own property when the acquiring and possession of such property is not contrary to law. * * * If the regulation of the business of brokers . . . cannot be enforced . . . without giving him, (the commissioner) the power to reach out and *invade individual rights*, then the legislation in question must fail . . . of the purpose which is sought by this enactment.

"The section of the act in question, if sustained, in connection with other provisions of the act, 'does more than regulate' the mode of 'disposing of property'. As we have heretofore pointed out, the corporation commissioner would have the power . . . to refuse a person a broker's permit . . . and by such refusal *the person would be prevented from disposing of his own individual property which he had lawfully acquired and lawfully possessed* . . . * * *

The rule in determining whether the act is in conflict with constitutional guaranties is *whether or not the act is broad enough to authorize such unconstitutional act.*" (Emphasis added.)

The preceding citations were based upon property rights guaranteed by the Fifth and Fourteenth Amendments, as well as Article 1, Section 1, California Constitution. In *Ex Parte Quarg*, 149 Cal. 79, the court amplified the meaning of Article I, Section 1, California Constitution, to include the right to acquire and possess the absolute and unqualified title to every species of property recognized by law with all of the rights incidental thereto, and, in connection with the right of personal liberty, the right was included to dispose of such property in such innocent manner as the owner thereof pleased.

In *Roystone v. Darling Co.*, 171 Cal. 525, the court extended this same Constitutional guarantee to include the individual's right to contract concerning the use, enjoyment, and disposition of said property; in *Binford v. Boyd*, 178 Cal. 458, it was ruled that the individual's Constitutionally guaranteed right to acquire, possess, and protect property is *invaded* if he is *not* at liberty to contract with others concerning the use to which he may subject his property, or the manner in which he may enjoy it. These property rights were specifically applied to a securities-owner's rights to dispose of his own securities, of which he is neither the issuer nor underwriter, in *Pollack v. Staunton*, 210 Cal. 656, when it stated that a *natural person* may sell his own securities, for his own account, without being required to obtain a permit, or license, from the Corporation Commissioner. The court, in *People v. Lesser*, 123 Cal. App. 489, further held that a *natural*

person had the right to sell his own stock, which he did not issue or underwrite, for his own account for such price as he could obtain in fair barter, citing in support thereof the *Quarg*, *Pace*, and *Pollack*, cases. In the *Lesser* case, the court further said:

> "Though in other jurisdictions, the courts have announced rules that may be at variance with the rule established by our courts in this regard, *we are bound by the precedent here established. The act* under which the defendant is charged is one avowedly seeking to regulate the sale of property, and *in so far as the regulation takes away the right of the owner to sell his own property, it is void. *. *. * Under the guise of 'regulation', a long established constitutional right, such as here involved, may not be abridged.*" (Emphasis added.)

Petitioner was the owner of the stock, which he sold. This fact is supported by the evidence, was conceded by respondent, in its Brief, and his ownership of the stock is referred to in the Opinion. This Court's attention is respectfully directed to the Statement of the Case herein where the foregoing is set forth.

The Legislature, in enacting Section 25152, Corporations Code, State of California, provided therein that the Corporate Securities Law should not apply to the sale of securities made by an owner, such as petitioner, for his own account, where he was not the issuer or underwriter thereof. However, this exemption is illusory because the Legislature *abridged* the owner's constitutionally guaranteed property rights by opening said section with the phrase "Except as expressly provided in this division," a phrase which therewith made Section 25152 subservient to Sections 25006 and 25700 of the same division. Section

25006, defining "broker," provides that the term includes "every person, other than an agent, who . . . engages . . . in the business of selling, offering for sale, or negotiating for the sale of, any security issued by others." It is apparent that, in excluding agent from its purview, Section 25006 was made broad enough to include an owner of stock within its scope, and the "exemption" ostensibly afforded to an owner, under Section 25152, becomes illusory. Solely upon the whim or caprice of the law-enforcement authorities, the securities transactions of an owner can be deemed to be exempt, under Section 25152, or they can be deemed to be evidence of the owner's "engaging in business," under Section 25006, the acts disclosed therein being such as to require a certificate so to do under Section 25700.

That the securities-owner's liberty, and property rights, may be jeopardized by the whim or caprice of the law-enforcement authorities, as aforementioned, is possible because Section 25006 pivots upon the uncertain substantive element "engage in . . . business" for which there is no statutory definition. The court found, in *Taft v. Shaw*, 284 Mo. 531, that:

> "Statutes and ordinances which fix crimes, or quasi crimes, should so fix them *that there could be no uncertainty*. They should be so worded *that one could read them, and know* whether or not he was violating the law. *They should not be so worded as to leave their substantive elements to the caprices of either judge or jury.* In other words *the law should be complete and definite*. What would be 'reasonable effort' under this law is left a question for the court or jury. What in the minds of one court or jury might be 'reasonable effort' might not be so consid-

ered by another court or jury. Each tribunal would be making its own ordinance. *This will not do for a law or ordinance criminal in* character." (Emphasis added.)

What would constitute "engaging in business," in the mind of one judge, jury, or law-enforcement agency, might not be considered to be "engaging in business" by another judge, jury, or law-enforcement agency, because there is no statutory criterion which determines what constitutes "engaging in business." Under such existing circumstances, a law-enforcement officer, may, at his whim or caprice, discriminatorily choose between two owners of the same securities issued by the same corporation, and acquired by them in identically the same manner and at the same time under the same circumstances, and decide that the sale of one of them was exempt as an owner, under Section 25152, while the sale of the other was evidence of "engaging in business" as a "broker," under Section 25006; which requires a previously-secured certificate, under Section 25700; not having previously secured a certificate from the Commissioner, under said Section 25700, the second owner, could be deemed to have committed a felony under Section 26104 and 26104(a), Corporations Code. Figuratively speaking, the possible enforcement of Section 25006, as just disclosed, is a "Damoclesian sword" hanging over the heads of each and every owner of securities in the State of California. Such statutes merit the statement found in *In re Bell*, 19 Cal. 2d 488:

> "Language prohibiting conduct which may be prohibited and conduct that may not, affords no reasonably ascertainable standard of guilt and *is* there-

> fore *too uncertain and vague to be enforced.* (Cited cases.) *A conviction based on such a statute can not stand* even though the acts of misconduct in the particular case could be validly prohibited by properly drafted legislation. (Emphasis added.)

As pointed out, previously, in *People v. Pace, supra,* and *People v. Davenport, supra,* the plenary powers delegated to the Commissioner of Corporations, by Section 25706, Corporations Code, are such as to render Sections 25152, 25006, and 25007, which must be read and interpreted in connection therewith, unconstitutional along with it. Section 25706, in the words of the *Davenport* case, "provides a power to refuse a permit, which would make *absolute* prohibition in the sale of one's securities," or, in the words of the *Pace* case, "the corporation commissioner would have the power . . . to refuse a person a broker's permit . . . and by such refusal the person would be prevented from disposing of his own individual property which he had lawfully acquired and lawfully possessed;" "the rule in determining whether the act is in conflict with constitutional guaranties is whether or not the act is broad enough to authorize such unconstitutional act."

> The Legislature may commit, to an administrative official, power to determine whether the facts of a particular case bring it within *a rule or standard previously established* BY THE LEGISLATURE *for his governance*; but, if no such standard be prescribed, there is an attempt to entrust a mere administrative officer with plenary power of the Legislature.
>
> *Dominguez Land Corporation v. Daugherty,* 196 Cal. 468.

A perusal of Section 25706, Corporations Code, will reveal that the Legislature, in the Corporate Securities Law, did not provide a previously established "rule or standard" for the governance of the Corporation Commissioner in determining the qualifications, or lack of them, of an applicant for a broker's certificate; instead, Section 25706 gives the Commissioner *untrammelled* discretion in determining whether or not a certificate shall be granted. Such plenary power is an effective previous restraint upon one's Constitutional rights, and is directly in point with *Sala v. People of the State of New York*, 334 U. S. 558; *Staub v. City of Baxley*, 78 S. Ct. 277; the Commissioner of Corporations stands athwart the channels of free speech, and the exercise of dominion and control over one's own money and property, an obstruction that can be removed only be being subjected to costly criminal proceeding, possibly leading to conviction necessitating an appeal. There can be no further previous restraint upon the exercise of one's Constitutional guarantees.

From the preceding discussion, it is obvious that the California Legislature, by incorporating in Section 25152, Corporations Code, (which section appears to exempt the securities transactions of an owner, neither the issuer nor underwriter thereof) a phrase which makes Section 25152 subservient to Section 25006, therewith made a law which abridged the privileges and immunities of the citizens of the United States, residing in California, the enforcement of which deprived petitioner of his liberty and property without due process of law, and denied him equal protection of the laws contrary to the guarantee stated in Section 1, Amendment 14, United States Constitution.

* * * * * * * *

(2) The same criterion, applied by the State court, in holding that an owner of securities, although neither

the issuer nor underwriter thereof, when buying and selling securities for his own account, is required to apply for and secure a permit, or license, from the Commissioner of Corporation as provided in Section 25700 Corporations Code, before he may purchase securities with the purpose of reselling them to the public, is that he "engages in business" as set forth in Section 25006, Corporations Code. Again, assuming the correctness of the contention, nevertheless, this Court will inquire whether the criterion, as applied, denied rights safeguarded by the Fifth and Fourteenth Amendments.

—— O ——

Although petitioner was the unqualified owner of the stock he sold, as set forth previously herein, nevertheless, he was charged with, and convicted for, "engaging in business" as a "broker" (Section 25006, Corporations Code), the statutory definition of which includes "purchasing such securities with the purpose of reselling them, or of offering them for sale to the public."

Upon reading the quoted phrases, the question logically arises: WHO IS THE PUBLIC? Fred G. Athern, former Commissioner of Corporations for the State of California, authored the following statement, printed in The Recorder of June 22, 1931, page 5:

> "It certainly cannot be that the purchase of securities with the intention of reselling them is an effort to evade the provisions of the Corporate Securities Act. *Very few persons ever buy securities except with the* INTENTION *of reselling them.*" (Emphasis added.)

This quotation, uttered by a former official, whose responsibility it was to administer the Corporate Securities Law, has a profound meaning. His was the sensible

realization that "to purchase securities with the intention of reselling them" could not constitute a violation of the Corporate Securities Law because "very few persons ever buy securities *except* with the intention of reselling them".

Obviously, every person, who purchased securities, would furnish respondent with *prima facie* evidence that he did so "with the purpose of reselling them", which, when, by whim or caprice, a law-enforcement agency decided that the purchase was evidence of "engaging in business", (there being no statutory definition thereof for its guidance) would make the stock-purchaser a "broker", under Section 25006, Corporations Code. If every person, who purchased stock, could be deemed to be a "broker", what and where is the PUBLIC to whom stock could be offered. The profit motivation, in the mind of every Californian, makes him a "broker" every time he buys securities. In the words of *People v. Pace, supra*, "it is readily apparent that if the act in question is sustained, a great many individuals who are owners of securities which they themselves did not issue or underwrite, would be required to secure a broker's license".

Thus it is that every person, in the State of California, who buys securities, has the burden of proving that he bought the securities with the intention, or purpose, of keeping them until he died. Otherwise, if he, by honest self-assessment, finds that his purchase of securities is being made "with the purpose of reselling them", he must apply for and secure from the Commissioner of Corporations a certificate, under Section 25700, before he purchases said securities as previously presented herein; Section 25706, Corporations Code, gives the Commissioner plenary power to grant or deny the application

for a certificate, the denial of which is a previous restraint (*Staub v. City of Baxley, supra*) upon the prospective securities-owner's property rights guaranteed to him by the Fifth and Fourteenth Amendments, United States Constitution.

* * * * * * * *

(3) The same criterion, applied by the State court, in holding that an owner of securities, although neither the issuer nor underwriter thereof, by buying and selling securities for his own account, committed a felony in violation of Section 26104(a), Corporations Code, is that he "engages in business", as set forth in Section 25006, Corporations Code, without first applying for and securing a permit, or license, from the Commissioner of Corporations, so to do. In further assuming the correctness of this contention, nevertheless, this Court will enquire whether the criterion, as applied, denied rights safeguarded by the Fifth, Sixth, and Fourteenth, Amendments, United States Constitution.

—O—

An Indictment, or Information, is *not* sufficient, and will *not* sustain a conviction, unless it charges *all* of the essential elements of the crime.

Banks v. United States, 239 F. 2d 409.

Or, to state the point affirmatively:

An Indictment, or Information, *must* contain *all essential elements of the crime charged*, and INFORM defendant therein of the nature and cause of the accusation against him, with sufficient certainty, to enable him to prepare his defense and, if he is later charged with the same offense, to interpose a plea of double jeopardy.

United States v. Apex Distributing Co., 148 Fed. Supp. 365.

Furthermore, it must be borne in mind:

> The validilty of an Indictment, or Information, is basic to any criminal conviction.
>
> *United States v. Russo*, 155 Fed. Supp. 251.

A typical count of the Information, under which petitioner was charged and convicted, is set forth in the Statement of the Case herein and this Court's attention is respectfully directed thereto in connection with the following argument.

Section 952, Penal Code, State of California, provides that the charging of an offense may be made in any one of the following ways:

(a) "in the words of the enactment describing the offense" or

(b) "in the words of the enactment . . . declaring the matter to be a public offense" or

(c) "in any words sufficient to give the accused notice of the offense of which he is accused."

In *In re Harder*, 9 Cal. App. 2d 153, the court declared therein:

> "We cannot have recourse to common law to determine prohibited acts. This rule is clearly stated in 7 California Jurisprudence, page 841, as follows, to wit: 'There is no criminal common law in California. All public offenses or crimes are statutory. . . .'"

Respondent has endeavored to base the count, charging petitioner with Violation of Section 26104(a), on Statutes, existing in the Corporations Code, by under-

scoring portions of those sections as follows (Resp. Br., pp. 60-62):

(Section 26104)

". . . every person who does any of the following acts is guilty of a public offense . . ."

(Section 26104(a))

"Knowingly sells any security contrary to the provisions of this division. . . ."

(Section 25700)

"No person shall act as a broker until it has first applied for and secured from the commissioner a certificate, then in effect, authorizing it so to do."

(Section 25006)

"'Broker' includes every person who engages in the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in, any security issued by others, or of purchasing such securities with the purpose of reselling them to the public . . ."

Thereafter, respondent makes the following statement, in which it delineates the alleged statutory support for the Information, with reference to the above-quoted sections (Resp. Br., pp. 63-64):

"A comparison between the underscored words in the Corporations Code Sections 26104, subdivision (a), 25700 and 25006 as set forth above, and underscored words of the Information, as set forth above, shows that the appellant was charged specifically with violation of Corporations Code Section 26104(a) in the words of that statute, which makes

it a public offense to "knowingly sell any security contrary to the provisions of the Corporation Securities Law (Corporations Code Section 26104, subdivision (a)); the section which prohibits acting as a broker without a certificate to do so (Corporations Code Section 25700); and the section which defines the term 'broker', *which section is specifically referred to therein.* (Corporations Code Section 25006.)" (Emphasis added.)

It is significant that respondent called attention to Section 25006 as being "specifically referred to" in the Information; Sections 26104 and 25700 were not specifically referred to, and can not be supplied by argument, intendment, or inference. *Champlin Ref. Co. v. Corporation Commissioner*, 286 U. S. 210.

It is incumbent upon respondent, in attempting to define a statutory crime, by assembling and correlating statutes, to collect and connect *all* of the pertinent code sections. Good pleading requires that the Information should unmistakably inform the accused as to the law he is alleged to have violated. *Corson v. United States*, (Calif.) 147 F. 2d 437. The fact that respondent called upon Section 25700 and 26104, neither of which is specified in the Information, in order to state the semblance of a statutory offense is, in itself, an admission that the Information does not charge a public offense; Section 26104 is required in order to establish that certain acts constitute a public offense, and Section 25700 is, requisite in a valid Information, to establish that a license, permit, or certificate, *must* first be obtained, from the Commissioner of Corporations, in order to do certain otherwise prohibited acts.

In *People v. Williams*, 27 Cal. 2d 220, the court stated that:

> "Of course, it is elementary that *every fact or circumstance* necessary to constitute the crime charged *must be alleged and proved*, and *the proof must correspond with the allegations in the pleading.*" (Emphasis added.)

Does the Information allege every *fact* or circumstance necessary to constitute the crime charged? An analysis of the allegations shows:

(a) petitioner was charged with the crime of violation of Section 26104(a), Corporations Code;

(b) the alleged crime was a felony;

(c) petitioner allegedly did "engage in the business" of buying and selling, offering for sale, and negotiating for the sale of securities;

(d) petitioner allegedly did purchase securities with the purpose of reselling them to the public;

(e) the alleged acts were as defined in Section 25000, Corporations Code;

(f) petitioner allegedly did sell and offer and caused to be sold a security;

(g) without first having secured a license to so do.

(a) Section 26104(a) does not specify that any of the acts disclosed therein constitutes a crime, so the allegation that petitioner committed the crime of violation of Section 26104(a) is a conclusion of the pleader, and not a fact. (*People v. Davenport, supra.*)

(b) That the alleged crime was a felony is likewise a conclusion of the pleader, there being no statute cited therein which so specifies.

(c) That petitioner did "engage in . . . . business" is also a conclusion of the pleader, there being no statute cited therein, which defines *what* constitutes "engages in business".

(d) That petitioner allegedly purchased securities, with the *purpose* of reselling them to the public, is a conclusion of the pleader requiring proof of specific intent; in *People v. Davenport, supra,* it was decided that purchasing securities "with the purpose of reselling them" to the public was not a public offense.

(e) That the alleged acts charged were as defined in Section 25006 is a conclusion of the pleader, the same acts are also exempt as set forth in Section 25152; furthermore, "engages in business" is *not* defined in Section 25006.

The Information failed to allege the statutory basis (Section 26104) for the charged crime, or the statutory requirement (Section 25700) that a permit, license, or certificate, was required before doing the acts which petitioner allegedly did.

The only items, in the list above, which were proved were:

(f) That petitioner sold some of his own stock, of which he was neither the issuer nor underwriter, for his own account.

(g) That he conceded that he did not have a license, permit, or certificate, from the Commissioner of Corporations, prior to the selling of his own stock, and that he had *not* been notified that he was required to obtain said certificate prior to the selling of his ow stock.

It is patent, from the foregoing analysis, that the Information did not meet the requirements, set forth in

People v. Williams, supra, as to the charging a crime, and the proof required to sustain a conviction thereunder did not correspond; petitioner was convicted of a crime which was not charged in the Information, and, with no crime charged, there was nothing to prove—there were no true issues declared in the Information.

The vagueness and uncertainty attaching to the phrase "engages in business", there being no statutory definition thereof, in prohibiting conduct which may be prohibited and conduct which may not, fails to set forth any ascertainable standard of guilt, and, therefore, is unenforceable.

People v. McCaughan, 49 Cal. 2d 409.

"'(A) statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' (Cited cases.) A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the courts called upon to apply it. (Cited cases)".

In re Clarke, 149 Cal. App. 2d 802.

"In determining whether a penal statute is sufficiently explicit to inform those who are subject to it what is required of them, the Court must endeavor, if possible, to view the statute from the standpoint of a reasonable man who might be subject to its terms (Cited case); and the requirement of reasonable certainty does not preclude the use of ordinary terms which find adequate interpretation in common usage and understanding. (Cited case)."

In *People v. Fuski*, 49 Cal. App. 4, the court stated that:

> "The main purpose of requiring the various elements of a crime to be set out in an indictment or information is to enable him (defendant) to suitably prepare his defense. *He is presumed to be innocent and*, therefore, *to have no independent knowledge of the facts that constitute the offense.*" (Emphasis added.)

It is apparent that, in view of the foregoing ruling, because an accused "is presumed to be innocent and to have no independent knowledge of the facts that constitute the offense," it is not incumbent upon him to search the Corporations Code and endeavor to assemble therefrom statutes which, when considered together, might define a public offense with which he is supposed to be charged. On the same basis, neither can an accused be expected to peruse the "transcript of the evidence before the committing magistrate." (*People v. Roberts*, 40 Cal. 2d 483) to ascertain "the nature and cause of the accusation" (Sixth Amendment, United States Constitution). The Amendment referred to states explicity that:

> "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation. . . ."

Thus, in the words of the above-quoted Amendment, "the accused *shall* be informed," is not required to inform himself. In *People v. Pond*, 44 Cal. 2d 665, the court stated that:

> "*Notice of the specific charge* against defendant is a Constitutional right of the accused. (*Cole v. Arkansas*, 333 U. S. 196.)" (Emphasis added.)

To comply with the Sixth Amendment, United States Constitution, an Indictment, or Information, must be sufficiently specific to advise the defendant of the nature and cause of the accusation, *Wong Tai v. United States* (Calif.), 273 U. S. 77.

That specificity, in the charging of a crime, is the prime requisite in preparing an Information, and failure to be specific in charging an offense, can be fatal to an accusatory pleading is dealt with in *United States v. Hess*, 124 U. S. 486:

> "* * * The general, and, with few exceptions . . . the universal rule on this subject, is, that all of the material facts and circumstances must be stated, or the indictment will be defective. *No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially,* or by way of recital."

Respondent failed to include, in the Information, citation of the specific statute which discloses that certain acts were prohibited except after the obtaining of a certificate from the Commissioner of Corporations (Section 25700), and the specific statute which specified that the doing of those acts, without having obtained said certificate prior thereto, was a public offense (Section 26104), both of which were essential elements in charging petitioner with the alleged offense in the case at bar. Such omissions were fatal because "no essential element of the crime *can be omitted* with *destroying* the whole pleading."

Also, respondent is precluded from supplying the omitted elements, "by intendment or implication," it being requisite that the "charge *must* be made *directly* and *not inferentially*, or by way of recital."

> Under this rule, respecting the contents of an indictment or Information with regard to a statute alleged to have been violated: *where reference to a statute must be considered because the Indictment is senseless, or lacking in essential allegations, unless the reference is considered, a misrecital of the statute may be fatal.*
>
> *United States v. Patterson*, 155 Fed. Supp. 669.

> Likewise, the complete failure to cite a statute, "where reference to the statute must be considered because the" Information "is senseless, or lacking in essential allegations, unless the reference is considered," will destroy the whole pleading (*United States v. Hess, supra*).

With regards to the pleading of a statutory crime, which respondent chose to do in terms of the statute, the court said, in *Azuma Kubo v. United States* (Calif.), 31 F. 2d 88:

> "* * * As a general rule, no doubt, it is sufficient to charge a statutory crime in the words of the statute; *but this is only true where the words in themselves fully, directly, and expressly, without any uncertainty and ambiguity, set forth all of the elements necessary to constitute the offense intended to be punished. United States v. Carll*, 105 U. S. 611." (Emphasis added.)

Even though the Information charges that petitioner did "engage in the business" of buying and selling securities, etc., allegedly defined in Section 25006, Corporations Code, the words, "engage in . . . business," do not "in themselves fully, directly, and expressly, without any uncertainty and ambiguity, set forth . . . elements . . . necessary to constitute the offense intended to be punished"; the phrase, "engage in . . . business" does *not in itself*, "fully, directly, and expressly, without any uncertainty and ambiguity, set forth" *any* "of the elements necessary to constitute the offense intended to be punished"; the phrase has no statutory definition whatsoever.

Furthermore, the allegation, in the Information, that petitioner had done certain acts "without first having applied for and secured . . . a license so to do" does not specify any statutory requirement that a certificate, permit, or license must be secured by an owner before said owner of stock, who is neither the issuer nor underwriter, thereof, may sell said stock for his own account.

> A criminal accusation MUST *contain* ALL *the ingredients of the offense* with which the defendant is charged, *in direct language*, leaving no essential to be reached by inference or argument.
>
> *People v. Green*, 65 Cal. App. 234.

The court stated, in *People v. Barry*, 153 Cal. App. 2d 193:

> "The sufficiency of an Information *must be tested in the light of the averments thereon contained.*" (Emphasis added.)

See:

People v. Pustau, 39 Cal. App. 2d 407.

The Supreme Court of the State of California, in *In Re Lockett*, 179 Cal. 581, stated:

> "It must be conceded, I think, that *it is essential to the validity of a statute creating a criminal offense that it show* in language capable of being understood by a person of ordinary intelligence *what it is that is prohibited.*" (Emphasis added.)

Since it was held, in *United States v. Hess, supra*, that *no* essential element of the crime can be omitted without destroying the whole pleading, the omission cannot be supplied by intendment or implication, (or a transcript of evidence before the committing magistrate. *People v. Roberts, supra.*) And neither can any essential be reached by argument (*People v. Green, supra*), respondent is precluded from arguing, at this point, that, from the allegation that petitioner had not secured a permit from the Commissioner of Corporations, "a person of ordinary intelligence" would presume that some statute must require petitioner to have secured a permit and, therefore, the "person of ordinary intelligence" would know that a crime had been committed.

In *United States v. Cruikshank*, 92 U. S. 542, in speaking of the necessity of greater particularity of statement, the Court said:

> "The object of the indictment is, *first*, to furnish the accused with such a description of the charge against him as to enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, *second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction*, should one be

had. For this, *Facts are to be stated*, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances." (Emphasis added.)

To the foregoing, a further requirement as to particularity of stating a crime, in the Information, is found in *Elder v. United States* (Calif.), 142 F. 2d 199, that it:

> ". . . include a recital of the acts alleged to constitute the offense in detail sufficient to bring them *within the scope of the offense* . . ." (Emphasis added.)

The Information, in the case at bar, is insufficient in that it failed to charge petitioner with the commission of a public offense in the terms of a statute; it failed "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law" and it failed to "include a recital of the acts alleged to constitute the offense in detail *sufficient to bring them within the scope of the offense.*" It stated the pleader's conclusions (*People v. Davenport, supra*), and a charge is insufficient which states mere legal conclusions (*People v. Green, supra*); none but ultimate facts are to be pleaded, a rule which applies to all kinds of pleading, whether civil or criminal (*People v. Timken*, 49 Cal. App. 18). As a general rule, no inferences of fact *not alleged* can be invoked to aid an Indictment, or Information, which must charge the crime in *words*; where the ultimate facts, necessary to complete description of the offense, have been omitted

from the pleading, it is insufficient (*People v. Lamanuzzi*, 77 Cal. App. 301). The court also held, in *People v. Tinnen, supra*:

> "In thus construing the information, we have not been unmindful of the rule that sufficient facts must be directly alleged in a criminal pleading from which it can be determined *upon inspecting or examining it* that the acts complained of are wrongful and unlawful and that, in construing an indictment or an information, nothing must be left to implication, intendment or conclusion." (Emphasis added.)

It is obvious that the count, in the Information, in the instant case, just analyzed (and the same may be said for all of the other counts), falls far short of the rule *that sufficient facts must be* DIRECTLY *alleged*" "from which it can be determined, "UPON INSPECTING AND EXAMINING IT, that the acts complained of are wrongful or unlawful," or that the facts alleged are such as to plainly show, to "a person of ordinary intelligence," that petitioner had committed a crime.

Thus, it is clear that, without the use of intendment, inference, argument, or explanation, the Information failed to give petitioner sufficient "notice" of the crime charged, when said Information is subjected to the test of charging an offense in terms of the statute, or to the test of the averments contained therein; the Information herein, in failing to give "notice" to petitioner, as guaranteed in the Sixth Amendment, United States Constitution, also denied him due process of law, guaranteed by the Fifth and Fourteenth Amendments.

* * * * * * * *

(4) The same criterion, applied by the State court, in holding that an owner of securities, although neither

the issuer nor underwriter thereof, is required to apply for and secure a permit, or license, from the Commissioner of Corporations, prior to his making a "sale" as defined in Section 25009, Corporations Code, is that he "engages in business" as used in Section 25006, Corporations Code. Assuming, further still, the correctness of the contention, nevertheless, this Court will inquire whether the criterion, as applied, denied rights safeguarded by the First and Fourteenth Amendments, United States Constitution.

—O—

During the preceding argument, under (1), the phrase, "engage in business," was shown to be a substantive element, by the statutorily undefined meaning of which the operation of Section 25006, Corporations Code, is rendered unconstitutional in that, together with Sections 25700, and 25706, the Commissioner of Corporations has the plenary power to abrogate, or not, as he may determine, a securities-owner's constitutionally guaranteed property rights under the Fifth and Fourteenth Amendments, United States Constitution.

Section 25006, operating together with Sections 25700 and 25706, can be used to perpetrate a further previous restraint upon a securities-owner, who is neither the issuer nor underwriter thereof, should he talk or write about his stock.

Should said owner of securities, of which he is neither the issuer nor underwriter, undertake to "sell" said securities, Section 25152 notwithstanding, while ostensibly under the purview of Section 25006 because he is deemed to "engage in business," he could be required to obtain a certificate, as required in Section 25700, even though no cash or securities were exchanged, because the act of

"selling" (Section 25009, Corporations Code) includes the use of a "circular letter" or an "advertisement" in making "an offer to sell, an attempt to sell," or a "solicitation of a sale" of his securities; and, should the Commissioner of Corporations deny said securities-owner a certificate, which he has plenary power to do under Section 25706, Corporations Code, the owner's right of free press, guaranteed under Amendment 1, United States Constitution, will have been abrogated.

Likewise, should the same owner be denied a certificate, by the Commissioner, his right to offer for sale, or negotiate for the sale of, his stock, for his own account, will be nullified even though he is also guaranteed the right of free speech under the First Amendment, United States Constitution. About such a situation, the Court, in *In re Bell, supra*, citing *Thornhill v. Alabama*, 310 U. S. 88, in support thereof, said:

> "A penal statute that 'does not aim specifically at evils within the allowable area of state control, but on the contrary sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of free speech or of the press . . . lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure' and '*results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded within its purview.*' (*Thornhill v. Alabama*, 310 U. S. 88.)" (Emphasis added.)

Thus, the securities-owner's constitutionally guaranteed right of free speech is under "a continuous and pervasive restraint" because, should he so much as talk about his purchase of his securities, their price, their prospective

future, etc., such "discussion . . . might reasonably be regarded within" the "purview" of Section 25000 of the Corporations Code, by "local prosecuting officials," thereby lending said Section "to harsh and discriminatory enforcement" "against particular" persons "deemed to merit their displeasure."

Schneider v. State, 308 U. S. 147.

> "The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth Amendment against abridgment by a state."

Bridges v. California, 314 U. S. 252.

> "For the First Amendment does not speak equivocally. It prohibits *any law* 'abridging the freedom of speech, or of the press.' *It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.*" (Emphasis added.)

* * * * * * * *

(5) The same criterion, applied by the State court, in holding that an owner of securities, although neither the issuer nor underwriter thereof, when buying and selling securities for his own account, does not come under the protection of the "exemption" Section 25152, Corporations Code, is that he "engages in business" as set forth in Section 25000, Corporations Code. Again assuming, further still, the correctness of the contention, nevertheless, this Court will inquire whether the criterion, as applied, denied rights safeguarded by the Fourteenth Amendment, United States Constitution.

—O—

Article I, Section 10, Cl. 1, United States Constitution, provides, in part:

"No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . . ."

The Constitution declares that all men are by nature free and independent and have certain inalienable rights, among which are those of acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness. These rights are *invaded* if the individual is not at liberty to contract with others respecting the use to which he may subject his property, or the manner in which he may enjoy it.

Binford v. Boyd, 178 Cal. 448.

The right to make contracts, common to all legitimate vocations, is a property right, the enjoyment of which is guaranteed by the Constitution; and though the Legislature may prescribe the form in which contracts shall be executed in order that they may be valid and binding, *it cannot limit the right of the parties to incorporate into their contracts, otherwise valid, such terms as may be mutually satisfactory to them.*

Stimson Mill Co. v. Braun, 136 Cal. 122;
People v. Holder, 53 Cal. App. 45.

The provisions declaring that all men possess "certain inalienable rights," among them the right of "acquiring, possessing, and protecting property," *is a guarantee that includes the right to contract concerning the* use, enjoyment, and *disposition of property*, which cannot be taken away or restricted by the Legislature.

Roystone Co. v. Darling, supra.

The preceding cited California authorities are in consonance with the Federal Constitution in upholding the individual's right to contract concerning the sale and disposition of property, recognizing that the Constitution of the United States is a solemn compact between the States, to be *enforced* by State legislation, or *by judicial action*; the State officer, whose duty it is to adjudicate or execute the laws, are governed by it; and, being a part of the supreme law of the land, it is a part of the law of each State.

In the Matter of Romaine, 23 Cal. 585;
Taylor v. Taintro, 16 Wall. 366, 21 L. Ed. 287.

The State of California embodied in Article I of its Constitution, Sections 11, providing for uniform operation of laws of a general nature, and 21, providing that no citizen—or class of citizens—should be granted privileges or immunities which, upon the same terms should not be granted to all citizens, to establish that the guarantee of equal protection of the laws, Amendment 14, United States Constitution, be fully operative within the State's jurisdiction.

> A law is general and uniform in its operation, within the meaning of Article I, Section 11, if it operates uniformly upon all persons standing in the same relation to the law in respect to the privileges and immunities conferred by it or the acts it prohibits.
>
> *Hellman v. Shoulters*, 114 Cal. 136.

> By "every law of a general nature shall have a uniform operation," is meant that the Legislature shall

not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

Ex Parte Smith and Keating, 38 Cal. 702.

The rule that a deliberate and intentional discriminatory enforcement is a denial of equal protection does not apply only to enforcement of criminal statutes.

People v. Gordon, 105 Cal. App. 2d 711.

A law is not general, or *constitutional*, if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from those who stand in precisely the same relations to the subject of the law.

Cassel v. Gregori, 28 Cal. App. 2d 769.

On page 12 of the Opinion, the District Court of Appeal, State of California, has stated the primary question in the case at bar, as follows:

"It is apparent, therefore, that a statutory exception to said provision in section 25152 is that the Corporate Securities Law does apply to sales of securities by an owner of securities who is *engaged in the business* of selling, or negotiating for the sale of, securities to the public. The charges herein against the defendant were in substance, as above shown, that he unlawfully engaged in the business of buying and selling and of negotiating for the sale of securities, as defined in said section 25006 of the Corporations Code, without having secured a license so to do. The issue herein, therefore, was whether or not defendant was unlawfully engaged in the business of buying and selling or of negotiating for the sale of

> securities without having a license so to do. *Mere proof that a seller* of securities *was the owner* of the securities at the time of the sale *does not* necessarily *exempt* the seller from said statutory requirement that a person who engages in the ' siness of selling, or negotiating for the sale of, securities to the public should be licensed to do." (Emphasis added.)

The foregoing holding, of the District Court of Appeal, is directly contrary to Section 1, Amendment 14, United States Constitution, which provides in part that:

> "No State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

In the instant case, petitioner's privileges and immunities have been abridged by the State's enforcement of a law, the Corporate Securities Law; petitioner is being deprived of his liberty and property without due process of law by the State's enforcement of the Corporate Securities Law; and petitioner is being denied equal protection of the laws by the State's enforcement of the Corporate Securities Law, of the State of California; insofar as its enforcement has affected petitioner in the foregoing ways, contrary to the provisions of Section 1, Amendment 14, United States Constitution, that Law is unconstitutional.

Petitioner was the unqualified owner of the stock which he sold; the evidence supports the fact of his ownership, and the State, in its Brief, pages 90-91, and 101, admitted that petitioner was the owner of the stock he sold. The

portion of the opinion, quoted above also concedes the point in stating that "It is apparent, therefore, that . . . the Corporate Securities Law does apply to the sales of securities by an owner of securities. . . ."; the "charges . . . were . . . that he unlawfully engaged in the business of buying and selling . . . securities, as defined in said section 25006 of the Corporations Code, without having secured a license so to do."

> The rights to acquire, enjoy, own and dispose of property are among the civil rights intended to be protected from discriminatory State action by the Fourteenth Amendment to the United States Constitution.
>
> *Sei Fujii v. State of California*, 38 A. C. 817.

The preceding ruling by a California court, in 1952, is but one of a long series, all based on Article I, Section 1, of the California Constitution, which provides:

> "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

The foregoing Constitutional provision was placed on the statute books in 1849 and based the California Supreme Court decision in 1857, in *Billings v. Hall*, 7 Cal. 1.

> The right of acquiring, possessing, and protecting property is one of the primary objects of government, is guaranteed by the Constitution, and *cannot be impaired by the Legislature.*

This was followed by another decision of the same court, in 1902:

> The right of property antedates all constitutions, and the individual's protection in the enjoyment of this right is one of the chief objects of society.
>
> *Stimson Mill Company, v. Braun, supra.*

In 1906, the California Supreme Court amplified the aforementioned Constitutional right in holding:

> The right of property includes the right to dispose of such property in such manner as the owner pleases, and to sell it for such price as he can obtain in fair barter.
>
> *Ex Parte Quarg*, 149 Cal. 79.

In 1915, the same court carried the Constitutional guarantee still further when, in *Roystone Co. v. Darling*, 171 Cal. 526, it held that the right of "acquiring, possessing, and protecting property" is a guarantee that includes the right to contract concerning the use, enjoyment, and disposition of property. Other decisions were handed down, in consonance with the foregoing, that:

> The Legislature cannot, under the guise of police regulations, enact laws not pertaining to the public welfare, public health, or public morals, which impose onerous and unnecessary burdens upon business and property.
>
> *Ex Parte Hayden*, 147 Cal. 649.

> A legislative body may not, under the guise of the police power, impose unnecessary and unreasonable restrictions upon the use of private property or the pursuit of useful activities.
>
> *McKay Jewelers, Inc., v. Bowron*, 19 Cal. 2d 595.

The California Supreme Court, in *Hart v. City of Beverly Hills*, 11 Cal. 2d 343 (1938), held that by judicial determination, evidenced by many legal precedents, the principle of law is THOROUGHLY ESTABLISHED that the constitutional rights of the individual to acquire and to possess property includes the right to dispose of it—ordinarily in such innocent manner as he may see fit to do—and *that no statutory restriction upon such personal liberty is permissible.*

United States v. Katz, 271 U. S. 354.

"All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with legislative purpose."

The California Supreme Court, in *Sutter-Yuba Investment Co. v. Waste*, 21 Cal. 2d 781, extended Justice Stone's statement further:

"In the case of *People v. Davenport*, 13 Cal. 2d 681, this court held that *the words of a statute* WILL NOT *be given their literal meaning when to do so would carry its operation beyond legislative intent and thereby make it apply to transactions not contemplated by the Legislature.*"

"This court has repeatedly held that statutes are to be interpreted in the light of reason and common sense and should not be given a construction which would lead to absurd consequences. (Cited cases.)" (Emphasis added.)

It is apparent that the California Legislature, in enacting Section 25006, Corporations Code, could not have had

any legislative intent or purpose to do what is beyond the scope of its authority under the California Constitution to do, and abrogate the individual's property rights guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution; it is furthermore apparent that, to give the words of Section 25006 their literal meaning, "would carry its operation beyond legislative intent and thereby make it apply to transactions not contemplated by the Legislature," would make agents out of principals, and brokers (as commonly defined) out of owners, a "construction which would lead to absurd consequences."

That there is a commonly-held distinction between the activities of an owner, or principal, and an agent, or broker, is attested to in numerous authorities such as the following:

On page 31, 12 C. J. S., Section 11, it is stated that even a broker:

> ". . . may sell securities *which he owns* to his customer, *in which case he does not act as a broker, but as a principal* in the sale of commodities." (Emphasis added.)

In *Williams v. Kinsey*, 74 Cal. App. 2d 583, the court made the observation:

> "That *when one deals in his own property his negotiations*, with reference to the sale or exchange thereof *do not constitute him a broker* within the meaning of the act. . . ." (Emphasis added.)

Since there is a widespread acceptance of the distinction between principal and agent, or owner and broker, the text comprising Section 25006, in specifically excluding an agent from its purview, and, with the exclusion, all that

pertains to agency, is contrary to its title, "Broker." This creates a decided inconsistency between the meaning of "broker" which is to be "construed according to the context and *the approved usage of the language*" (Code Civ. Proc., Sec. 16), and the meaning of "Broker" which the Legislature has endeavored to give it in Section 25006, making said Section decidedly vague and ambiguous.

Section 25006, Corporations Code, defines some acts which it designates as being those of a "broker," therein specifying that the term:

> ". . . includes every person, other than an agent, who, in this State, engages wholly or in part in the business of selling, offering for sale, negotiating for the sale of . . . any security issued by others . . . or of purchasing such securities with the purpose of reselling them, or offering them for sale to the public."

The wording of the section quoted, in specifying that a "broker" "includes *every person*, other than an agent," reveals that the section is intended to have a meaning broader than the commonly accepted definition found in Webster's New International Dictionary, Second Edition, unabridged:

> "Broker—One who, for a commission or fee, brings parties together and assists in negotiating contracts between them. Such contracts ordinarily cover the sale of property. . . . The broker does not, *as broker*, take possession of, or have a lien upon, the subject-matter of the negotiation. . . . He is primarily the *agent* of the party who originally *employs* him. . . ." (Emphasis added.)

An explanatory definition of "broker," in line with the foregoing, is found in 12 C. J. S. Sec. 11, p. 29, quoted as follows:

> "The primary and essential feature underlying the relation of customer and broker is that of *agency, and is ordinarily a special agency* (*Anderson v. Geo. L. Barnet Co.*, 1 CA 2d 340), and the rules of law, applicable to principal and agent generally, govern THEIR RESPECTIVE RIGHTS AND LIABILITIES." (Emphasis added.)

Morgan v. Jaudon, 40 How. Pr. (N. Y.) 378:

> "A broker is a *mere intermediate agent* negotiating between buyer and seller." (Emphasis added.)

Bouvier's Law Dictionary, Rawles 3rd Edition, carries the following definitions:

> "Brokers—Those who are engaged for others in the negotiation of contracts relative to property, *with the custody of which they have no concern.*
>
> "Stock Brokers—Those *employed* to buy and sell stocks and bonds in incorporated companies and government bonds." (Emphasis added.)

This would definitely mean that a stock broker is an *agent* for his principal.

Furthermore, on page 13 of the Opinion, the District Court of Appeal states that petitioner was also "engaged in the business" of buying and selling as follows:

> "The jury could have reasonably found from the evidence that at the time defendant agreed to sell

> Stadia stock to the various persons, mentioned in the counts of which he was convicted, he was not the owner of the stock he subsequently delivered to them; that after he had agreed to sell stock to those persons, he purchased stock from Collins and the Smith Company in order that he might make delivery of the stock he had agreed to sell; and that he was engaged in the business of buying and selling, and of negotiating for the sale of, the stock.

The record will show that petitioner did *not* buy Stadia stock *from* Collins; he bought it from a C. A. Upson, owner of the shares, through the *agency* of Collins, and what the jury could have found, and what it would have found had it been given petitioner's requested instructions pertaining thereto, is conjectural.

However, assuming, *arguendo*, had the jury found, as the Opinion states it could have found, that petitioner contracted for the sale of Stadia stock prior to his acquisition thereof, the transactions would have been no more than contracts for future delivery of stock, commonly termed "short sales". Further assuming, *arguendo*, that petitioner's contracting for future delivery of stock was evidence that he bought, negotiated for the sale of, and sold stock for his own account, it does not necessarily follow therefrom that he was "engaging in the business" of buying and selling, and of negotiating for the sale of, stock; and particularly is this so in view of the fact that there is no statutory definition as to what constitutes "engaging in business" as the term is used in Section 25006, Corporations Code, which defines a "broker". Nowhere, in the record, or in judicial or legal authority, is there any support whatsoever for the contention, in the Opinion, that petitioner "*engaged in the business*

of buying and selling, and of negotiating for the sale of the stock" because "he purchased stock from Collins and the Smith Company in order that he might make delivery of the stock he had agreed to sell".

If the individual's right to contract for the future delivery of stock, or make a "short sale", is restricted or prohibited by Section 25000, that statute is in direct contravention to Article I, Section 10, Cl. 1, United States Constitution.

The many preceding citations show that the California courts are aware of the individual's Constitutional right to contract concerning property, said right including the right to contract sales for future delivery, called "short sales" which, in *Provost et al. v. United States*, 269 U. S. 443, is given the following definition:

> "A 'short sale' is a contract for sale of shares of stock which the seller does not own, or certificates which are not within his control, so as to be available for delivery at the time when, under the rules of the exchange, delivery must be made."

The sale of stock, to be delivered in the future, is valid and lawful, as declared in *Cleves v. Jamieson*, 182 U. S. 461:

> "The generally accepted doctrine . . . as stated by Mr. Benjamin*, that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the

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*Benjamin on SALES, Secs. 541-542, and Notes to 4th Am. Ed. by Bennet.

parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer . . . *Irwin v. Williar*, 110 U. S. 499.

"And the fact that at the time of making the contract for future delivery the party binding himself to sell has not the goods in his possession and has no means of obtaining them for delivery otherwise than by purchasing them after the contract is made, does not invalidate the contract.

"In *Hibblewhite v. McMorine*, 5 M&W 462: 'The fact that at the time of the sale the complainants did not own any of the stock cannot support the presumption (that it was a gaming contract), because it is perfectly valid to make such a sale, and an illegal intent accompanying the performance of a perfectly legal act cannot be presumed.'"

Respondent, on pages 90-91 of its Brief, makes a statement which brings to light another possible type of transaction, a modification of the "short sale" termed a "sale against the box":

"And there is no evidence that the appellant ever transferred the shares represented by the certificate for 9850 shares which he asserted he bought before he sold any shares of stock to the complaining witnesses."

Louis Loss, in his book, Securities Regulation (1951), page 678, quotes from Stock Exchange Practices*, regarding the "sale against the box" as follows:

"A type of sale not technically a short sale, but similar in nature, is a 'sale against the box'. In such

*Report of the Committee on Banking and Currency, S. Rep. No. 1455, 73rd Cong., 2d Sess. (1934).

> a transaction, the seller owns and possesses stock which he can deliver but which for some reason he prefers not to deliver. * * * It is contended by stock exchange authorities that a 'sale against the box' is not a short sale, since the customer need not buy the stock back but may make delivery from securities in his box. It is plain, however, that where a person initially makes a 'sale against the box' but subsequently changes his mind, there is nothing to prevent him from covering in the open market. In such case he is indistinguishable from any other short seller.'"

In *People v. Vickers*, 8 Cal. App. 2d 315, the court held:

> "Further testimony showed that no demand was ever made for the stock, and there is no showing whatsoever that Strong could not have delivered the stock. If Strong personally had and owned a block of stock in the Nevada Corporation, which he could deliver, he had a right to sell a portion of it without a permit. *People v. Pace*, 73 Cal. App. 548; *Clover v. Jackson*, 81 Cal. App. 55.

The court, in *LeBreton v. Cook* (Calif.), 40 Pac. 552, made the succinct statement that:

> "The right of an owner to sell property *prevails* no matter whether . . . the seller's interest be one in possession *or a future interest*." (Emphasis added.)

From the foregoing, together with the evidence, in the record, that the stock was delivered, by petitioner, to the complaining witnesses, it can be readily seen that petitioner intended to, and did make, delivery of the stock, that no wagering or gaming contracts were even con-

tem.plated, granting, *arguendo*, that appellant did not have the stock when he sold it, and that petitioner's stock transactions fell in either of the two catagories: "short sale" or "sale against the box". Neither type of transaction is indicative of, or determinative of, "engaging in business" as a broker, defined in Section 25006, Corporations Code; the construing of the Corporate Securities Law in a manner to permit its enforcement against petitioner by charging him with "engaging in business" as a "broker" because he sold his own stock, of which he was not the issuer or underwriter, for his own account, is, as held in *People v. Gordon, supra*, a deliberate and intentional discriminatory enforcement which denied petitioner equal protection of the laws and abridged his privileges and immunities under Amendment 14, United States Constitution.

As of the year 1925, the Corporations Code section, pertaining to the exemption of an owner's securities transactions, nevertheless endeavored to regulate an owner's transactions by specifying that the Corporate Securities Law did not apply to an owner's disposing of his own securities for his own account *provided he did not make repeated or successive sales;* that portion of the Act was determined to be unconstitutional, in *People v. Pace, supra*, because what constituted "repeated or successive sales" was vague and ambiguous.

The California Legislature, faced with the judicial determination that the phrase "repeated or successive sales" was unconstitutional, when applied to an owner's securities-transactions as a means of exercising control over them, attempted to retain control over the owner's securities transactions by devising the even more vague and ambiguous phrase "engages in business"; the phrase "en-

gages in business" is but a broader and more subtle substitute for the phrase "repeated or successive sales", and is equally unconstitutional.

United States v. L. Cohen Grocery Co., 255 U. S. 81, 41 S. Ct. 298.

"Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can forshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury . . ."

Schneider v. State, supra.

"In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preference or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to maintenance of democratic institutions. And so, when cases arise, the delicate and difficult task falls upon the courts to weigh the cir-

cumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

In Re Bell, 19 Cal. 2d 488,

"The Constitution is the bulwark of our civil liberty and it should be so construed as to protect that liberty against encroachment even under the guise of the police power. While some of its provisions have at time been emasculated by enthusiastic advocates of the police power doctrine, the Constitution still remains the fundamental law of the land and will continue to be such so long as the ideal of civil liberty is predominate in the hearts and minds of the American People."

Section 25152, as it stands today, is open to the same condemnation, of vagueness and ambiguity, in that it makes an otherwise clearly defined owner's exemption, from application of the Corporate Securities Law, subservient to Section 25006 by the opening phrase thereof: "Except as expressly provided in this division"; Section 25006 is also in the same division as Section 25152, and provides that a "broker" includes every person, other than an agent, who "engages in the business" of buying and selling securities, issued by another. Thus, under an equally vague and ambiguous phrase, "engages in business", (of which there is no statutory definition), the securities transactions of an owner, who is not the issuer or underwriter thereof and made only for his own account, the Legislature has sought to regulate and control said securities owner's transactions while ostensibly observing said owner's property rights, guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution.

CONCLUSION.

Wherefore, your petitioner prays that a Writ of Certiorari issue, under the seal of this Court, directed to the District Court of Appeal, Second Appellate District, State of California to the end that this cause may be reviewed and determined by this Court, as provided by the Statutes of the United States; and that the Judgment herein, of said District Court of Appeal, be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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